Supreme Court, U.S.
FILED
APR 7 2003
CLERK

(6) (2)

Nos. 02-1124 and 02-1135

In the Supreme Court of the United States

JULIANNE M. BOWLER, COMMISSIONER OF INSURANCE OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES, ET AL.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
ROBERT M. LOEB
KATHLEEN A. KANE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

27 pp

QUESTION PRESENTED

Whether the federal government is bound by claim-filing deadlines established by a state court under a state law relating to insurance company insolvency proceedings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Barnett Bank of Marion County, N.A. v. *Nelson*, 517 U.S. 25 (1996)	4, 11
Block v. *North Dakota*, 461 U.S. 273 (1983)	19
Boozell v. *United States*, 979 F. Supp. 670 (N.D. Ill. 1997)	14
Davister Corp. v. *United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998)	14, 15
FDIC v. *Meyer*, 510 U.S. 471 (1994)	19
Finn v. *United States*, 123 U.S. 227 (1887)	19
Garcia v. *Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993)	7, 8, 12, 15, 16
Heckler v. *Chaney*, 470 U.S. 821 (1985)	21
Howard v. *Wal-Mart Stores, Inc.*, 160 F.3d 358 (7th Cir. 1998)	15
Humana Inc. v. *Forsyth*, 525 U.S. 299 (1999)	13
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	6, 18, 21
Lincoln v. *Vigil*, 508 U.S. 182 (1993)	21
Lujan v. *Defenders of Wildlife*, 497 U.S. 871 (1990)	20, 21
Munich Am Reins. Co. v. *Crawford*, 141 F.3d 585 (5th Cir.), cert. denied, 525 U.S. 1016 (1998)	14, 15
Munro v. *United States*, 303 U.S. 36 (1938)	19
Patsy v. *Board of Regents*, 457 U.S. 496 (1982)	19
Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984)	18, 21

Cases—Continued: Page

State ex rel. Clark v. *Blue Cross Blue Shield of W. Va., Inc.*, 510 S.E.2d 764 (W. Va. 1998) 15, 16
Stephens v *American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) 14, 15
UNUM Life Ins. Co. v. *Ward*, 526 U.S. 358 (1999) 13
United States v. *Dawkins*, 629 F.2d 972 (4th Cir. 1980) 17
United States v. *Hoar*, 26 F. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373) 3, 10
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 22
United States v. *Mitchell*, 463 U.S. 206 (1983) 18
United States v. *Moore*, 423 U.S. 77 (1975) 2
United States v. *Moriarty*, 8 F.3d 329 (6th Cir. 1993) 17
United States v. *Mootaz*, 476 U.S. 834 (1986) 18
United States v. *Nordic Vill., Inc.*, 503 U.S. 30 (1992) ... 19
United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 4
United States v. *Summerlin*, 310 U.S. 414 (1940) 2, 3, 10
United States v. *Thompson*, 98 U.S. 486 (1878) 3, 10, 11
United States Dep't of Treasury v. *Fabe*, 508 U.S. 491 (1993) 7, 10, 11-12, 14, 15
Webster v. *Doe*, 486 U.S. 592 (1988) 21
Webster v. *Fall*, 266 U.S. 507 (1925) 22

Constitution and statutes:

U.S. Const. Art. IV, § 3, Cl. 2 (Property Clause) 3
Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 21
5 U.S.C. 701(a)(2) 21
5 U.S.C. 702 ..... 6, 19, 20-21
5 U.S.C. 706 19
Federal Arbitration Act, 9 U.S.C. 1 *et seq.* 14
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 5

Statutes—Continued:

	Page
McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*	*passim*
15 U.S.C. 1012	6
15 U.S.C. 1012(b)	2, 4, 10
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*	13
11 U.S.C. 101(27)	11
11 U.S.C. 502(b)(9)	11
28 U.S.C. 2415-2416	17
28 U.S.C. 2415(a)	17
31 U.S.C. 3713	2, 5, 6, 7, 8-9
31 U.S.C. 3713(a)(1)(A)(iii)	2
31 U.S.C. 3713(b)	2, 17
Mass. Gen. Laws, ch. 175:	
§ 180C	4
§ 180F	4

Miscellaneous:

H.R. Rep. No. 1656, 94th Cong., 2d Sess. (1976)	19
Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976)	19
Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1970)	20

In the Supreme Court of the United States

No. 02-1124

JULIANNE M. BOWLER, COMMISSIONER OF INSURANCE OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES, ET AL.

No. 02-1135

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 303 F.3d 375. The decision of the district court (Pet. App. 21a-46a) is reported at 164 F. Supp. 2d 232.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 02-1124.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2002. On October 11, 2002, the court of appeals denied the rehearing petition filed by petitioner in No. 02-1124 (Pet. App. 47a-48a). Petitioner in No. 02-1124 filed a petition for a writ of certiorari on January 27, 2003. On November 19, 2002, the court of appeals denied the petition for rehearing filed by petitioners in No. 02-1135 (Pet. App. 51a-52a). Petitioners in No. 02-1135 filed a petition for a writ of certiorari on January 28, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the relationship among the Federal Priority Statute, 31 U.S.C. 3713, the United States' immunity from state statutes of limitations, *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940), and the McCarran-Ferguson Act, 15 U.S.C. 1012(b), in the context of Massachusetts' insurance company insolvency scheme.

1. The Federal Priority Statute, 31 U.S.C. 3713, gives the federal government first priority for its claims against an insolvent entity's estate. It provides that a "claim of the United States Government shall be paid first when * * * a person indebted to the Government is insolvent and * * * an act of bankruptcy is committed." 31 U.S.C. 3713(a)(1)(A)(iii). It further provides that any representative of the estate who pays claims ahead of the United States' claims may be "liable to the extent of the payment for unpaid claims of the Government." 31 U.S.C. 3713(b). The statute has its roots in English common law, and some form of the statute has been in place since the Nation's founding. See *United States* v. *Moore*, 423 U.S. 77, 80-81 (1975).

The claims of the United States are not only entitled to a statutory priority, but are also beyond the reach of state limitations periods, unless Congress by statute provides otherwise. See *United States* v. *Thompson*, 98 U.S. 486, 488 (1878) ("a State statute cannot bar the United States"); *Summerlin*, 310 U.S. at 416 ("It is well settled that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights."); *United States* v. *Hoar*, 26 F. Cas. 329, 329 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.) (deeming it "too plain for argument, that the statutes of limitations of Massachusetts cannot proprio vigore bind or bar the suits of the national government"). That rule has its roots in "the English law from a very early period," *Thompson*, 98 U.S. at 489; see *Hoar*, 26 F. Cas. at 330 (rule "has for several centuries universally prevailed"), and the United States' immunity to state limitations periods was "imparted to the new government as" one of the "incidents of the sovereignty" when "the national Constitution was adopted," *Thompson*, 98 U.S. at 489. The same principle is also reflected in the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, which subjects the disposition of federal property (such as choses in action) to congressional control.

Finally, notwithstanding the general rule that federal statutes ordinarily preempt conflicting state laws, Congress has provided a presumption against statutory preemption of state laws regulating "the business of insurance." In particular, the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of

> insurance * * * unless such Act specifically relates to the business of insurance.

15 U.S.C. 1012(b). Congress passed the McCarran-Ferguson Act to address the unanticipated effects of *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), in which this Court held that the issuance of an insurance policy was a transaction in commerce and therefore subject to the federal antitrust laws. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 40-41 (1996). The McCarran-Ferguson Act serves to protect state regulation of the business of insurance against inadvertent federal intrusion. *Id.* at 39.

2. The American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston (collectively American Mutual) were declared insolvent in 1989. Pet. App. 22a-24a. Pursuant to state law, Mass. Gen. Laws ch. 175, § 180C, the Insurance Commissioner of Massachusetts (petitioner in No. 02-1124) was appointed permanent receiver in state court proceedings. Pet. App. 23a. Massachusetts law authorizes the state court supervising such proceedings to set a claim-filing deadline, although it does not impose any particular constraints on the choice of deadlines. Mass. Gen. Laws ch. 175, § 180F. The Massachusetts statute also provides the order in which claims are to be paid. See *ibid.*; Pet. App. 26a n.11. Under it, claims for administrative expenses are given first priority; the claims of policyholders, beneficiaries, insureds, and insurance guaranty funds are second; claims for the return of premiums are third; and claims of the United States (unless in a higher priority category) are fourth. Various other claims are assigned a lower priority. See *id.* at 26a n.11.

In March 1989, the receivership court ordered American Mutual's creditors to file their claims by March 9, 1990. Pet. App. 25a. The Department of Labor filed a claim for unpaid Longshore and Harbor Workers' Compensation Act assessments before the deadline, and other federal entities filed claims as well. Some federal claims were filed after the deadline, including claims under the Medicare Secondary Payer provision. *Id.* at 25a & n.7.

To facilitate the distribution of American Mutual's assets, the United States agreed to waive its rights under the Federal Priority Statute as to four early distributions to eligible state insurance guaranty funds as partial reimbursement of their claims against American Mutual's assets. (After paying the claims of an insolvent insurer's policyholders, state insurance guaranty funds often seek reimbursement from the insolvent insurer's estate.) Those early distributions totaled approximately $174 million, and by December 31, 1999, the guaranty funds had recovered about $308 million. Pet. App. 25a n.8; 02-1124 Pet. 13. The receivership court approved a proposed fifth distribution of about $10 million in 1999. The United States, however, declined to waive its priority rights for that distribution, because it was concerned that the remaining assets might be insufficient to cover its claims. Pet. App. 25a-26a. On May 14, 1999, the Massachusetts Insurance Commissioner filed a motion for approval of a liquidation plan "providing for denial of late filed claims," including those of the United States. *Id.* at 26a. That motion remains pending. *Id.* at 26a n.10.

On November 22, 2000, the Massachusetts Insurance Commissioner filed this declaratory judgment action against the United States and the Attorney General in his official capacity. The complaint described the action

as a suit "for non-monetary specific relief" with respect to "a federal agency's final action or failure to act." Compl. 2, ¶ 2. The complaint averred that, although the suit was against the United States and an officer in his official capacity, it was covered by the waiver of immunity contained in the Administrative Procedure Act, 5 U.S.C. 702, or was within this Court's holding in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Compl. 2-3, ¶ 2.

The complaint sought a declaration that, by dint of the McCarran-Ferguson Act, 15 U.S.C. 1012, Massachusetts' priority for the claims of "insurance guaranty funds" is not preempted by the Federal Priority Statute. It also sought a declaration that state law may bar the United States' claims if they are not timely filed. Pet. App. 21a. The district court observed:

> [T]he Receiver requests a declaration (A) in Count II, that she may pay the claims of insurance guaranty funds prior to non-policyholder claims by the federal government and (B) in Count I, that federal government claims are subject to the March 9, 1990 filing deadline set by the state receivership court.

Ibid.; see Compl. 11 (Prayer ¶¶ 1-2).[2]

The district court resolved the case on cross motions for dismissal and summary judgment. With respect to the priority for insurance guaranty fund claims, the court ruled in favor of the Massachusetts Insurance Commissioner. The district court explained that, in

---

[2] The complaint also sought an order requiring the United States to "act on the Receiver's request for assent or a conditional waiver regarding the proposed fifth distribution to the guarantee funds." Compl. 11 (Prayer ¶ 3). That request for relief has never been acted upon. See pp. 20-21 note 11, *infra*.

United States Department of Treasury v. *Fabe*, 508 U.S. 491 (1993), this Court concluded that certain priorities in Ohio's insurance liquidation scheme were enacted "for the purpose of regulating the business of insurance" and therefore saved from preemption by the McCarran-Ferguson Act. In particular, the Court upheld priorities for administrative and policyholder claims notwithstanding the Federal Priority Statute. Those priorities, the Court stated, regulated "the business of insurance" because they were aimed at the insurer-insured relationship, *i.e.*, ensuring that the insurer would fulfill its promises. But the Court also concluded that other priorities had an insufficient relationship to the insurer-insured relationship to fall within McCarran-Ferguson. Pet. App. 29a-30a. In this case, the district court concluded that the priority for insurance guaranty funds, like the policyholder priority in *Fabe*, was "designed to protect policyholders of an insolvent insurer." *Id.* at 31a. The insurance guaranty fund system, the court stated, expedites payments to policyholders: The guaranty fund pays the insured immediately, but then seeks compensation (with a policyholder-level priority) against the insolvent insurer's estate. *Id.* at 31a-32a.

With respect to untimely claims, however, the district court granted summary judgment in favor of the United States, holding that Massachusetts cannot bar the United States' claims. The question, the court explained, is "controll[ed]" by the First Circuit's decision in *Garcia* v. *Island Program Designer, Inc.*, 4 F.3d 57 (1993). Pet. App. 40a. *Garcia* applied this Court's decision in *Fabe*, *supra*, to hold that the Federal Priority Statute preempts the Puerto Rico insurer liquidation statute's claim-filing deadline. In an opinion by then-Chief Judge Breyer, the court of appeals explained

that the deadline did not regulate "the business of insurance" within the meaning of the McCarran-Ferguson Act and *Fabe*, because it was "not *directed at* the protection of policyholders, insofar as it 'helps policyholders only to the extent that (and in the same way as) it helps all creditors.'" Pet. App. 36a (quoting *Garcia*, 4 F.3d at 62). *Garcia* also observed that the deadline was not "necessary for the protection of policyholders," and "liquidation would still prove manageable" without it. *Ibid.* (quoting *Garcia*, 4 F.3d at 62). The district court concluded that, "[u]nder any fair reading of *Garcia*," it was "obligated to" hold "that the Massachusetts filing deadline in insurance liquidation proceedings" is not covered by McCarran-Ferguson and is therefore "preempted by the federal priority statute." *Id.* at 40a.

3. The parties cross-appealed, and the court of appeals affirmed. Pet. App. 20a. Applying *Fabe*, *supra*, the court of appeals separately examined the two aspects of the Massachusetts scheme at issue. The court determined that the priority given to state insurance guaranty funds was sufficiently tied to the payment of policyholder claims to constitute regulation of the business of insurance within the meaning of the McCarran-Ferguson Act and *Fabe*. Pet. App. 6a-14a. It therefore held that the McCarran-Ferguson Act saved that priority from preemption by the Federal Priority Statute. The United States has not sought this Court's review of that ruling.

The court of appeals also concluded that, under *Fabe*, the claim-filing deadline was not enacted "for the purpose of regulating the business of insurance" and that, as a result, the McCarran-Ferguson Act did not save it from federal preemption. The court explained that its earlier decision in *Garcia* had already resolved that

issue. Pet. App. 15a. The court of appeals nonetheless added "a word about *Garcia*, partly to stress that it is consistent with the view we take of *Fabe*," which "draws the line at state law that focuses protection on policyholder claims." *Id.* at 16a. "An early bar date for the United States," the court reaffirmed, "has only a limited effect on policy holders—who have priority [under *Fabe*] anyway—and equally or primarily helps other general creditors." *Ibid.* "*Garcia*," the court stated, "correctly applied *Fabe*." *Ibid.*

The court of appeals noted that the lack of a firm bar date for federal claims could pose administrative difficulties, but emphasized that "this is a matter for the legislature, not the courts." Pet. App. 17a. Petitioner's effort to subject the United States to a one-year deadline was itself fraught with difficulty, the court stated, because it would subject the United States to a random patchwork of state-law claim deadlines. *Id.* at 18a. The court also noted that "the United States is likely limited as to some of its claims by a patchwork of federal statutes of limitations," *id.* at 17a, and that "the United States may give a waiver" of its rights, *ibid.*

Finally, the court of appeals granted the motion of various guaranty funds (petitioners in No. 02-1135) to intervene. Pet. App. 18a-19a. The court concluded that, because their interests were adequately represented by the Insurance Commissioner (petitioner in No. 02-1125), the guaranty funds could not intervene as of right. *Id.* at 24a. Although the court did not find that the district court had abused its discretion in denying the guaranty funds' motion for permissive intervention, the court of appeals exercised its "own discretion to allow" intervention "in the case at this time on a going-forward basis." *Id.* at 20a.

ARGUMENT

The court of appeals correctly concluded that a state limitations period cannot extinguish the claims of the United States. Its decision does not conflict with any decision of this Court or of any court of appeals, and faithfully applies this Court's decision in *United States Department of Treasury* v. *Fabe*, 508 U.S. 491 (1993). There are, moreover, potential jurisdictional defects that might prevent this Court from reaching the question on which petitioners seek review. Accordingly, further review is unwarranted.

1. Petitioners argue that, under the McCarran-Ferguson Act, state-imposed claim-filing deadlines in insurance insolvency proceedings bind the United States. The court of appeals correctly rejected that contention.

a. Petitioners do not dispute the longstanding and "well settled" rule "that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights," unless Congress provides otherwise by statute. *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); *United States* v. *Thompson*, 98 U.S. 486, 488 (1878) ("a State statute cannot bar the United States"); *United States* v. *Hoar*, 26 F. Cas. 329, 329 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.) (deeming it "too plain for argument, that the statutes of limitations of Massachusetts cannot proprio vigore bind or bar the suits of the national government"). Instead, petitioners rely on the anti-preemption provision of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

That provision states that "*[n]o Act of Congress* shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the

business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b) (emphasis added). The rule that state limitations periods do not of their own force extinguish the United States' claims, however, is not an "Act of Congress" or the product of such an Act. It is instead one of the "incidents of * * * sovereignty" that, like sovereign immunity, was "imparted to the new government" when "the national Constitution was adopted"—a part of the constitutional design. *Thompson*, 98 U.S. at 489.[3] As a result, the McCarran-Ferguson Act has no bearing on that rule. And it certainly does not purport to waive the United States' immunity to state limitations periods or otherwise expose its claims to extinction by state law. Contrast 11 U.S.C. 502(b)(9), 101(27) (imposing deadline for claims submission by any "governmental unit," including "the United States," in federal bankruptcy cases). The purpose of the McCarran-Ferguson Act was "to protect state insurance regulation primarily against *inadvertent* federal intrusion," *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 39 (1996), not to surrender federal claims and property rights to state limitations periods.

b. Petitioners' argument also fails under *Fabe*, as the court of appeals properly held. In *Fabe*, this Court held that the McCarran-Ferguson Act's anti-preemption provision applies "to the extent" that a state law regulates the insurer-policyholder relationship. 508

---

[3] As the Court explained in *Thompson*: "The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the States can pass statutes of limitation binding upon the Federal government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark." 98 U.S. at 490.

U.S. at 508. The Court also made it clear that a law "designed to further the interests of other creditors * * * is not a law enacted for the purpose of regulating the business of insurance." *Id.* at 508-509. Applying that analysis to the elements of the Ohio statute before it, the Court held that Ohio's statutory priority for administrative and policyholder claims regulated the business of insurance, because they ensured "actual performance of [the] insurance contract," a critical element of the insurer-policyholder relationship. *Id.* at 503-505, 508. The Court, however, held that the "preferences conferred upon employees and other general creditors * * * do not escape pre-emption because their connection to the ultimate aim of insurance"—risk spreading and allocation—"is too tenuous." *Id.* at 509.

In this case and in *Garcia* v. *Island Program Designer, Inc.*, 4 F.3d 57, 60-62 (1993), the First Circuit correctly applied *Fabe* to conclude that the McCarran-Ferguson Act does not save insurance insolvency limitation periods from preemption. As the First Circuit has twice explained (Pet. App. 16a; 4 F.3d at 62), such limitations periods are designed to aid in the resolution of the insolvency and to help creditors generally, rather than to affect the rights of policyholders; they thus benefit policyholders only to the degree that they benefit creditors generally. *Fabe* explicitly rejects the argument that "indirect effects are sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act." 508 U.S. at 508-509. The First Circuit thus correctly held that a general claim-filing deadline does not regulate the business of insurance and does not fall within the McCarran-Ferguson Act's anti-preemption provision.

c. Contrary to the suggestion of petitioners in No. 02-1135 (at 14-16), the decision in this case is consis-

tent not only with *Fabe* but also with *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999), and *UNUM Life Ins. Co.* v. *Ward*, 526 U.S. 358 (1999). In *Humana*, the Court concluded that permitting plaintiffs to invoke the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, against an insurance company did not "invalidate, impair, or supersede" Nevada's laws regulating the business of insurance, even though the federal and state remedies were not precisely parallel. 525 U.S. at 313. There was no dispute, however, that the Nevada laws at issue there were enacted for the purpose of regulating the business of insurance. Thus, the only question was whether the federal law "invalidate[d], impair[ed], or supersede[d]" the Nevada laws. *Id.* at 306-314. Here, in contrast, the question is whether the claims deadline is a law enacted "for the purpose of regulating the business of insurance." That question is controlled by *Fabe*, not *Humana*.

Further, while petitioners in No. 02-1135 invoke *UNUM Life* for the unremarkable proposition that courts evaluating preemption should consider whether state laws specifically address policy issues unique to the insurance context, the First Circuit did exactly that here. It concluded that, unlike the law at issue in *UNUM Life*, claims deadlines in liquidation are not unique to insurance regulation, and benefit all creditors generally, rather than policyholders in particular. That is especially true where, as here, actual policyholders—who should be identifiable by the receiver and have a priority in any event—should be unaffected by late-filed federal creditor claims. *Fabe* makes it clear that state laws are not automatically protected by

McCarran-Ferguson merely because they deal with insurer insolvency.[4]

2. Petitioners' contention that the lower courts are divided (02-1124 Pet. 21-26; 02-1135 Pet. 11-14), is likewise incorrect. See Pet. App. 15a & n.6 (explaining that petitioner in No. 02-1124 "perhaps overargues" that "a few courts elsewhere have not agreed with *Garcia*"). First, while petitioners argue that "the Tenth, Fifth, and Second Circuit[s] * * * have taken a broader view of the protection accorded state insurer liquidation," 02-1124 Pet. 23; see 02-1135 Pet. 11-14, not one of the court of appeals cases they cite—*Munich Am. Reins. Co.* v. *Crawford*, 141 F.3d 585 (5th Cir.), cert. denied, 525 U.S. 1016 (1998); *Davister Corp.* v. *United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), cert. denied, 525 U.S. 1199 (1999); and *Stephens* v. *American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995)—addresses claim-filing deadlines, much less deadlines that purport to extinguish the rights of the United States. To the contrary, those cases concerned the relationship between the McCarran-Ferguson Act and the Federal Arbitration Act, as petitioners concede (02-1124 Pet. 24). The only federal court of appeals to have addressed the question presented here is the First Circuit—in this case and in *Garcia*, *supra*—a consideration that itself weighs against further review.[5]

---

[4] The court of appeals' suggestion that "the dissenting position in *Fabe*" might some day "prevail," Pet. App. 9a, undermines rather than supports petitioners' position. The dissenters in *Fabe* would have held that no part of the Ohio insolvency statute, not even its priority scheme, is a law "enacted . . . for the purpose of regulating the business of insurance." 508 U.S. at 514 (Kennedy, J., dissenting).

[5] Petitioners also assert a conflict with a district court case, *Boozell* v. *United States*, 979 F. Supp. 670 (N.D. Ill. 1997). But that

Two of the cases cited by petitioners (the Second Circuit's decision in *Stephens* and the Tenth Circuit's decision in *Davister*), moreover, cite the First Circuit's *Garcia* decision with apparent approval, as the court of appeals pointed out. Pet. App. 15a-16a n.6 (citing *Davister*, 152 F.3d at 1281 n.5, and *Stephens*, 66 F.3d at 45). The Fifth Circuit's decision in *Munich* merely notes a "potential difference in approach between *Stephens* and *Garcia*." *Id.* at 16a n.6 (citing *Munich*, 141 F.3d at 592). And any difference is readily explained by the distinct questions presented. Unlike the effort to bar the United States' claims at issue here and in *Garcia*, the invalidation of arbitration clauses in private insurance and reinsurance policies at issue in *Stephens* clearly regulates the terms of policyholder and reinsurance contracts; it thus falls within the McCarran-Ferguson Act's anti-preemption rule. See *Stephens*, 66 F.3d at 44-45 (upholding anti-arbitration rule because it directly "regulates the performance of insurance contracts" and thus "is crucial to the 'relationship between [an] insurance company and [a] policyholder'") (quoting *Fabe*, 508 U.S. at 501).

For similar reasons, petitioners (02-1124 Pet. 22; 02-1135 Pet. 10) err in relying on *State ex rel. Clark* v. *Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E.2d 764 (W. Va. 1998), which involved a distinct statutory scheme. Here, the Massachusetts Insurance Commissioner sought a ruling that would permit "denial" of "late-filed claims," including those of the United States. Pet. App. 26a; pp. 5-6, *supra*. In contrast, the West Virginia statute at issue in *Clark* accorded lower

---

case is not binding precedent even within the Northern District of Illinois. See, *e.g.*, *Howard* v. *Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998).

priority to late-filed claims, but did not attempt to extinguish them altogether. *Clark*, 510 S.E.2d at 781. The West Virginia Supreme Court relied on that difference, holding that "a state may impose a limitation date on federal claims against an insolvent insurance company * * * *when that date merely subordinates the priority of late-filed federal claims rather than causing them to be absolutely invalidated.*" *Id.* at 779 (emphasis added). The court repeatedly emphasized that difference. "[N]o proofs of claim are rendered void or invalid due to their untimely filing," it reiterated, and "[c]onsequently, [the statutory provisions in issue] do not violate the principle that the United States is not bound by state statutes of limitation." *Id.* at 781.[6] *Clark* thus turned at least in part on the fact that the statute there, unlike the one here, did not seek to void or invalidate the United States' claims. There thus is no conflict between this case and *Clark*, and petitioners would not prevail even under *Clark*'s rationale.[7]

---

[6] See *Clark*, 510 S.E.2d at 779 (distinguishing state laws "that completely abrogated the government's claim or suit"); *id.* at 780 ("Unlike a statute of limitation, the time limitation and claim subordination imposed by [West Virginia law] do not prohibit the United States from bringing its claim.").

[7] For that reason, the concerns that *Clark* expressed about the result in *Garcia* are not properly presented by the petition; this case would have been resolved the same in either court. *Clark*'s conclusion that a state insurance liquidation statute may accord untimely claims by the United States a lower priority than timely filed policyholder claims is also consistent with *Garcia*'s suggestion that a trustee "would have to provide, for example, the United States with a first priority so long as he had, say, actual notice (or 'constructive' notice through recording) of the claim" if "he did not have formal notice through a 'proof of claim' filed directly in the liquidation proceeding." 4 F.3d at 62. While we do not necessarily agree with the result in *Clark*, particularly insofar as it purports to

Petitioners also indulge in hyperbole when they claim that the court of appeals' decision has the practical effect of preventing receivers from paying policyholder claims. In fact, the court of appeals' decision expressly upholds Massachusetts' statutory *priority* for policyholder and guaranty fund claims; it thus promotes rather than impedes distributions to those claimants. See Pet. App. 10a-14a. Petitioners' prophecies, moreover, are at odds with the fact that the law of the First Circuit they challenge, regarding state-law filing deadlines for United States' claims, has been settled for nearly a decade now, since *Garcia*. And the decision in this case nowhere declares that States cannot pay timely policyholder claims ahead of untimely policyholder claims for which they have no notice (including those of the United States). See pp. 16-17 note 7, *supra*. Thus, as the court of appeals observed, an earlier "bar date for United States claims has only a limited effect on policyholders—who have priority anyway." Pet. App. 16a; *Garcia*, 4 F.3d at 62 (without bar date, liquidation of policyholder claims "would still prove manageable").

Petitioners also appear to understate the protection offered by federal limitations periods,[8] the ability of receivers to limit their exposure by examining the

---

subordinate untimely United States policyholder claims to non-policyholder claims, neither *Clark* nor its rationale conflicts with the First Circuit's decision here.

[8] A number of courts have held that government claims in cases like this one are subject to the statutes of limitations set forth in 28 U.S.C. 2415-2416. See, *e.g.*, *United States* v. *Moriarty*, 8 F.3d 329, 332-333 (6th Cir. 1993) (holding that 28 U.S.C. 2415(a)'s six-year limitations period for contract actions applied to action against debtor's representative under 31 U.S.C. 3713(b)); *United States* v. *Dawkins*, 629 F.2d 972, 975 (4th Cir. 1980) (same).

insurer's policy records, and the extent to which the United States cooperates with state officials to facilitate claims resolution. Here, for example, the United States voluntarily waived its asserted priority to permit $174 million in early distributions. See Pet. App. 25a-26a & n.9; 02-1124 Pet. 13. Petitioners, however, neither sought the United States' cooperation following the filing of notices of appeal in this case in late 2001, nor after the court of appeals resolved the legal uncertainty surrounding the United States' and petitioners' rights in October 2002. Nonetheless—in light of the court of appeals' resolution of the legal rights of the parties and further research—the United States has contacted counsel for petitioner in No. 02-1124 to propose a resolution petitioner had once proposed herself, see Pet. App. 67a.

3. Finally, we note a potential jurisdictional barrier to further review, not yet addressed by the parties or the courts. Because this lawsuit was brought against the United States and the Attorney General in his official capacity in an effort to limit the claims and property rights of the United States, federal courts lack jurisdiction over it absent an Act of Congress waiving the United States' immunity to suit. See *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949) (suit seeking to bar government's sale and delivery of its coal to anyone but respondent is an action against the sovereign); see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101-102, 112-113 (1984) (suit for decree that operates against sovereign is an action against the sovereign). "The terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction," *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986), and must be strictly construed in favor

of the sovereign, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).[9]

The complaint in this case (at 11, ¶ 2) relied on the waiver of immunity contained in the Administrative Procedure Act (APA), 5 U.S.C. 702. That waiver, however, applies only to suits brought under the APA itself—that is, suits for judicial review of final "agency action," 5 U.S.C. 702, requesting that the action be held unlawful and set aside, or that action unlawfully withheld or unreasonably delayed be compelled, 5 U.S.C. 706.[10] As this Court has explained, any plaintiff

---

[9] Sovereign immunity is sufficiently "jurisdictional in nature," *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), that the issue can be raised for the first time on appeal, *Finn* v. *United States*, 123 U.S. 227, 232 (1887); cf. *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 n.19 (1982) (sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar that it may be raised by the State for the first time on appeal" (internal quotation marks omitted)). It likewise cannot be waived by the actions of individual executive officers. *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn*, 123 U.S. at 232-233; see *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983) (waiver must be enacted by Congress).

[10] That is clear from the waiver's location—it appears as part of the APA in 5 U.S.C. 702 rather than as a free-standing enactment—and its legislative history. See *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 105 (1976) (testimony of then-Assistant Attorney General Scalia) ("an important factor in our support for the bill" is "that the waiver of immunity, since it is made via section 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act"); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 11 (1976) ("Since the Amendment is to be added to 5 U.S.C. section 702, it will be applicable only to functions falling within the definition of 'agency' in 5 U.S.C. section 701."). The waiver's authors expressed the same view: "Because the amend-

"claiming a right to sue [under Section 702] must identify some 'agency action' that affects him in the specified fashion"; and "it is judicial review 'thereof' to which he is entitled." *Lujan* v. *Defenders of Wildlife*, 497 U.S. 871, 882 (1990).

Here, petitioners do *not* challenge final agency action, or seek to have such action set aside. Nor do they seek to compel agency action that has been withheld. Rather, they ask the Court to address *en vacuo* the validity of a state statute that purports to extinguish the United States' right to money or property, without regard to the propriety of any federal conduct. Indeed, the only part of the complaint that even arguably addressed agency action appears to have been abandoned.[11] Because petitioners have neither "identif[ied]

---

ment is to be added to 5 U.S.C. § 702 (a provision of the Administrative Procedure Act entitled right of review)," the Chairman of the ABA's Administrative Law Section explained, "it will be applicable only when that provision is applicable." *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 59 (1970) (statement of Dan M. Byrd, Jr.); *id.* at 222 (testimony of Prof. Kenneth Culp Davis) ("Because the amendment is to be added to 5 U.S.C. §§ 702 and 703 * * * it will be applicable only when those provisions are applicable."); *id.* at 238 (testimony of Prof. Roger Cramton) ("The proposal is an amendment to the Administrative Procedure Act" and thus "is applicable only to administrative conduct * * * that is contemplated for judicial review by the APA.").

[11] Petitioner's *only* claim relating to agency action was Count III, which asserted that the United States "unreasonably delayed action" on the request for a waiver of its priority rights. Compl. 11, ¶ 35; see *ibid.* (Prayer ¶ 3) (requesting order requiring the United States to act on request for assent). That allegation and the associated prayer for relief, however, were never addressed by any court, and petitioners do not press them in this Court. They are not, moreover, cognizable under the APA. Under 5 U.S.C.

some 'agency action' that affects [them] in the specified fashion" nor sought "judicial review" of that agency action, *Lujan*, 497 U.S. at 882, their claim does not arise under the APA and is not covered by the waiver of immunity provided therein.

For similar reasons, the complaint (at 3, ¶ 2) errs in suggesting that *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. at 689-690, authorizes this suit. *Larson* held that an action seeking to prohibit an authorized federal officer from selling and delivering federal property to anyone but the plaintiff *is* an action against the sovereign itself—and therefore barred by sovereign immunity—because it seeks disposition of the sovereign's property. 337 U.S. at 688. The same is true of petitioner's suit, which seeks to terminate the United States' claims against the estate. Petitioner, furthermore, has identified no unconstitutional or otherwise *ultra vires* conduct (much less final agency action) that (by legal fiction) may be deemed individual conduct rather than that of the United States itself. See *Larson*, 337 U.S. at 689-690; *Pennhurst*, 465 U.S. at 102, 104-105, 112-117. The resulting jurisdictional doubts weigh heavily against further review.[12]

701(a)(2), no provision of the APA (including the waiver of immunity in Section 702) applies where "agency action is committed to agency discretion by law." Decisions concerning whether or when to enforce the rights of the United States are, barring constitutional infirmity, ordinarily committed to agency discretion by law within the meaning of Section 701(a)(2). See *Heckler* v. *Chaney*, 470 U.S. 821, 830, 835-837 (1985); *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993). As to such decisions, there is "no law to apply." *Webster* v. *Doe*, 486 U.S. 592, 599 (1988).

[12] There may have been a similar issue lurking in the record in *Fabe*, but it appears to have passed unnoticed. See *Pennhurst*, 465 U.S. at 119 ("[W]hen questions of jurisdiction have been passed on

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
ROBERT M. LOEB
KATHLEEN A. KANE
Attorneys

APRIL 2003

---

in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not considered as having been so decided as to constitute precedent."); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (where issue was not "raised in briefs or argument nor discussed in the opinion," decision is not "binding precedent on th[e] point").